

Appeal No. 02-3394

Cir. Ct. No. 99CV005436

**WISCONSIN COURT OF APPEALS
DISTRICT I**

CHRISTINA PITTS AND CLIFFORD PITTS, SR.,

**PLAINTIFFS-PETITIONERS-
APPELLANTS,**

**WISCONSIN PHYSICIANS SERVICE INSURANCE
CORPORATION, A WISCONSIN INSURANCE CORPORATION
AND SENTRY INSURANCE, A MUTUAL COMPANY,**

**INVOLUNTARY-PLAINTIFFS-
RESPONDENTS,**

V.

**REVOCABLE TRUST OF DOROTHY KNUEPPEL,

DEFENDANT.**

FILED

MAR 18, 2004

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Deininger, P.J., Vergeront and Lundsten, JJ.

The issue in this case arises from a dispute between injured plaintiffs and their underinsured motorist (UIM) coverage provider. After the tortfeasor's insurer settled for its policy limit, the tortfeasor offered an additional settlement payment to the plaintiffs. The plaintiffs are now seeking to require the UIM provider to either consent to the settlement, thereby waiving its subrogation right against the tortfeasor, or pay the settlement amount directly to the plaintiffs while preserving its subrogation right against the tortfeasor. In *Vogt v. Schroeder*,

129 Wis. 2d 3, 8, 383 N.W.2d 876 (1986), the supreme court faced a similar situation, differing mainly in that the settlement offer in that case was from the tortfeasor's insurer rather than from the tortfeasor directly. The court held that the UIM provider was required, as a matter of equity, to either consent to the settlement or substitute a payment of its own to the injured insureds. *Id.* at 19-20. The issue in this appeal is whether a similar requirement should be imposed on these facts.

Plaintiffs Christina Pitts and Clifford Pitts, Sr., commenced this action against defendant Dorothy Knueppel for personal injuries to Christina arising from a motor vehicle accident. Knueppel's insurer, American Family Mutual Insurance Company, offered a settlement of its policy limit of \$100,000. The Pittses' UIM provider, Sentry Insurance, paid the Pittses that amount to preserve its right to seek subrogation from the tortfeasor in the event that a UIM claim was made. Following Knueppel's death, the Revocable Trust of Dorothy Knueppel was substituted as a defendant. The Trust offered a further settlement to the Pittses of \$40,000. The Pittses impleaded Sentry into the case as a third-party plaintiff, and filed a motion for declaratory judgment to compel Sentry to consent to the settlement or substitute its own payment to the Pittses. The circuit court denied the motion, and the Pittses appeal.

The Pittses rely on *Vogt*. They argue that the court in *Vogt* created an extra-contractual, equitable remedy that properly balances the interests of insurers and injured insureds. They argue that the equitable considerations present in *Vogt* are also present in this case, because it makes little equitable difference whether the settlement is coming from the tortfeasor's insurer, as in *Vogt*, or from the tortfeasor directly, as here.

In response, Sentry argues that because its policy language provides for a *Vogt*-like substitution when the victim settles with the tortfeasor's insurer, that language necessarily implies that no such substitution is required under any other circumstance, such as settlements with persons other than the tortfeasor's insurer. Sentry further argues that the "trust agreement" provision in its policy bars the imposition of a consent or substitute requirement. Finally, Sentry argues that *Vogt* does not control in this situation for the above reasons, and also because allowing a plaintiff to settle directly with a tortfeasor, thereby depleting the tortfeasor's assets, would directly contravene the UIM carrier's right to seek subrogation against the tortfeasor. The Pittses dispute each of these points.

It appears that resolution of this issue will require interpretation or clarification of the *Vogt* decision to determine whether it applies to the current facts. Because *Vogt* was a decision by the supreme court, that court is best suited to determine the scope of the equitable procedure it created in that opinion.

In addition to the above issue, the Pittses raise issues related to recovery of interest and attorney fees. These issues were not decided by the circuit court because its conclusion on the merits made a decision unnecessary. While the supreme court may choose to address these issues because they are related to the main issue, it also may be appropriate, if the court reverses on the main issue, to remand for the circuit court to address them. Therefore, we do not discuss them further in this certification.

